79-2938

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MEMORANDUM FOR: Director of Central Intelligence

VIA: Deputy Director of Central Intelligence

FROM: Daniel B. Silver
General Counsel

SUBJECT: Status of Identities Legislation

1. This memorandum is for your information, to bring you up to date on recent developments in OLC's and OGC's joint efforts to obtain identities legislation.

2. On 13 July 1979 you transmitted to the Director, Office of Management and Budget proposed legislation to protect the identities of certain CIA and military intelligence employees, agents and sources. You also provided our proposal to the Attorney General. Subsequently, we provided copies of the proposal to key officials in the Department of Justice who will advise the Attorney General on this subject, as well as to Mike O'Neil, Chief Counsel, House Permanent Select Committee on Intelligence. Since then we have had discussions with members of the Department of Justice and the HPSCI staff in an attempt to reach agreement on a bill that would obtain the widest possible support.

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Discussions with DoJ

3. The main concern of the Department of Justice centers around Section 801 of our proposed bill (attached) which would make it an offense for anyone to disclose the identity of a CIA or military intelligence employee, agent or source if the person making the disclosure has knowledge that the United States takes affirmative measures to conceal the relationship involved. DoJ's concern is rooted in the First Amendment's command that "Congress shall make no law ... abridging the freedom of speech, or of the press...." Our bill is worded the way it is, however, because Philip Agee and others have revealed the identities of intelligence personnel by speech and press activities. While a statute

aimed at employees and former employees, or persons with "authorized access" (see attachment) would encompass Messrs. Agee [redacted] it could be circumvented through a collusive publication by some non-employee, such as [redacted] who are currently associated with Covert Action Information Bulletin. While theoretically prosecution of the employee who provided the information would still be possible, as a practical matter there would be no way to discover who the employee is. Secondly, the damage to intelligence interests is the same for all intents and purposes whenever an accurate disclosure of covert intelligence personnel is made, regardless of who is behind the disclosure. The real question is whether the First Amendment provides such a degree of protection that speech and press disclosures of intelligence identities can never be made criminal. In my view, it does not.

4. In an attempt to overcome DoJ's constitutional concerns, we have discussed with DoJ the addition of a specific intent element to the section of our proposed bill that covers disclosures by any person. This additional element would require that the Government prove that the disclosure was made "with intent to obstruct the intelligence activities of the United States." With the addition of this element, it is evermore difficult to see how the disclosures made by Agee and others would be found protected under the First Amendment. I do not think the Supreme Court would find that the identities of covert intelligence personnel are close enough to the heart of the core area protected by the First Amendment that the Congress, after hearings and appropriate findings that significant national interests are at stake, could not proscribe the disclosures at issue. Furthermore, besides adding the specific intent element, we have discussed adding certain defenses and bars to prosecution in order to limit the statute's coverage. For example, there would be a bar to prosecution for any disclosure made to the Attorney General, the Intelligence Oversight Board, the President, or any committee of the Congress having oversight jurisdiction for intelligence activities.

5. The Department of Justice is considering the above matters and is expected to recommend a position to the Attorney General by the end of this week. I have advised the Department on your behalf that, in the event the Department determines it cannot support our position as modified along the above lines, you or Frank Carlucci would like to meet with the Attorney General to discuss the matter.

Discussions with the HPSCI Staff

6. Our discussions with the HPSCI staff have revolved around the same issues that we have discussed with DoJ. In HPSCI's case, however, the staff seems to better understand that the only effective solution to the identities problem is a bill that covers disclosures by publications like Covert Action Information Bulletin. The Chief Counsel, Mike O'Neil, expects to have a decision from the members on the coverage issue some time after HPSCI's hearings on the greymail procedures bill on 20 September 1979.

[redacted]

STA

Daniel B. Silver

Attachment

cc: DDO
DDA
OLC
D/Security

CRIMINAL PENALTIES FOR THE UNAUTHORIZED DISCLOSURE OF INFORMATION IDENTIFYING CERTAIN INDIVIDUALS ENGAGED OR ASSISTING IN FOREIGN INTELLIGENCE ACTIVITIES

Approved For Release 2004/05/12 : CIA-RDP83-00156R000300010032-9

A BILL

To prohibit the disclosure of information identifying certain individuals engaged or assisting in foreign intelligence activities of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Intelligence Identities Protection Act of 1979."

STATEMENT OF FINDINGS

Sec. 2. The Congress hereby makes the following findings:

(a) Successful and efficiently conducted foreign intelligence activities are essential to the national security of the United States.

(b) Successful and efficient foreign intelligence activities depend in large part upon concealment of relationships betwen components of the United States Government that carry out those activities, and certain of their employees and other persons.

(c) The disclosure of such relationships to unauthorized persons is detrimental to the successful and efficient conduct of foreign intelligence and counterintelligence activities of the United States.

(d) Individuals who have a concealed relationship with foreign intelligence components of the United States may be

exposed to physical danger if their identities are disclosed to unauthorized persons.

Sec. 3. Title 18, United States Code, is amended by adding the following new chapter:

"Chapter 38--DISCLOSURE OF INFORMATION IDENTIFYING CERTAIN INDIVIDUALS ENGAGED OR ASSISTING IN FOREIGN INTELLIGENCE ACTIVITIES"

Section 800. Definitions. As used in this Chapter:

(a) "Authorized" means with authority, right, or permission pursuant to the provisions of statute, Executive Order, directive of the head of any department or agency engaged in foreign intelligence activities, order of a judge of any United States district court, or resolution of the United States Senate or House of Representatives which assigns primary responsibility for the oversight of intelligence activities.

(b) "Discloses" means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available to any person.

Section 801. Disclosure of Intelligence Identities.

(a) OFFENSE: Whoever intentionally discloses, to anyone not authorized to receive it, information that identifies any person as presently or formerly having a relationship with the Central Intelligence Agency or a foreign intelligence component of the Department of

Defense as an officer, employee, agent, or source of information or operational assistance, knowing or having reason to believe that the United States takes affirmative measures to conceal such relationship, is guilty of an offense.

(b) PENALTY: An offense under this section is punishable by a fine of not more than $25,000 or imprisonment for not more than five years, or both.

Section 802. Disclosures by Individuals with Authorized Access to Information.

(a) OFFENSE: Whoever, having or having had authorized access to information that identifies any person as presently or formerly having a relationship with the Central Intelligence Agency or a foreign intelligence component of the Department of Defense as an officer, employee, agent, or source of information or operational assistance, intentionally discloses such information to anyone not authorized to receive it, knowing or having reason to believe that the United States takes affirmative measures to conceal such relationship, is guilty of an offense.

(b) PENALTY: An offense under this section is punishable by a fine of not more than $50,000 or imprisonment for not more than ten years, or both.

Section 803. Certification. No indictment or information may be filed for an offense under this Chapter unless the

Attorney General and head of the appropriate department or agency engaged in foreign intelligence activities have certified in writing to a court with appropriate jurisdiction that, at the time of the disclosure, the relationship revealed by the information disclosed met the criteria for classification under any then-applicable Executive Order establishing standards for the protection of national security information, and that the United States in fact had taken affirmative measures to conceal such relationship.

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CRIMINAL PENALTIES FOR THE UNAUTHORIZED DISCLOSURE OF INFORMATION IDENTIFYING CERTAIN INDIVIDUALS ENGAGED OR ASSISTING IN FOREIGN INTELLIGENCE ACTIVITIES

SECTIONAL ANALYSIS AND EXPLANATION

The bill would add a new Chapter 38 to Title 18, United States Code, imposing criminal penalties for certain disclosures of information identifying specified categories of persons engaged or assisting in foreign intelligence activities. The bill creates two similar but independent offenses, the more serious being the exposure of certain intelligence personnel by persons currently or formerly having authorized access to the information disclosed.

Section 2 of the bill entitled the "Foreign Intelligence Identities Protection Act of 1979" lists a number of "Findings" which serve to underscore the fact that in order for the foreign intelligence components of the United States Government to fulfill their mission it is essential that certain relationships maintained by foreign intelligence entities with officers, employees, agents and sources of information or operational assistance remain concealed. The success of the United States Government's foreign intelligence activities, the physical safety and well-being of the individuals involved, and, ultimately, the nation's security depend on the preservation of such relationships.

Section 800, "Definitions," contains the definition of the terms "authorized" and "discloses" as used in the bill.

The term "authorized" means with authority, right, or permission granted pursuant to the provisions of a statute, Executive Order, directive of the head of any department or agency engaged in foreign intelligence activities, order of a U.S. district court judge or the terms of any United States Senate or House of Representative resolution which assigns primary responsibility for the oversight of intelligence activities. Under the definition of the term "authorized," the bill would not impose criminal penalties for disclosures made pursuant to a Federal court order or to either of the Intelligence Oversight Committees, or for disclosures otherwise authorized by statute or Executive Order or by directive of the head of any U.S. department or agency engaged in foreign intelligence activities.

The term "discloses" means to reveal by any means whatsoever, including publication in the press or other public information media.

Section 801 would make it a criminal offense, subject to a $25,000 fine or up to five years imprisonment, or both, for any person intentionally to disclose, to anyone not authorized to receive it, information that identifies any person as presently or formerly having a relationship with the Central Intelligence Agency or a Department of Defense foreign intelligence component as an officer, employee, agent, or source of information or operational assistance when the person who discloses such information knows or has reason to believe that the United States takes affirmative measures to conceal such relationship.

The phrase "intentionally discloses...knowing or having reason to believe that the United States takes affirmative measures to conceal such relationship" is meant to encompass only the knowing, deliberate disclosure of information that identifies specified intelligence personnel when such disclosure is made with knowledge or reason to believe that the United States takes affirmative measures to conceal the relationship between the person identified and the CIA or foreign intelligence component of the Department of Defense. No specific motive to harm the United States or benefit a foreign government is required.

The reference to "affirmative measures" is intended to narrowly confine the effect of the bill to relationships that are deliberately concealed by the United States Government. The bill would not make it a crime to disclose the identity of an intelligence officer merely because the association of that officer with an intelligence agency had not been acknowledged publicly or was to be found in classified documents. Rather, the bill would apply to disclosure of an identity only where affirmative measures had been taken to conceal such identity, as, for example, by creating a cover or alias identity or, in the case of intelligence sources, by using clandestine means of communication and meeting to conceal the relationship involved. Proof of knowledge or reason to believe that the United States takes affirmative measures to conceal the relationship will depend upon the facts and circumstances of each case. Proof of knowledge could be demonstrated by showing that the person disclosing the information has or had an employment or other relationship with the United States that required or gave him such knowledge. It could also be demonstrated by statements made in connection with a disclosure or by previous statements evidencing such knowledge. "Reason to believe that the United States takes affirmative measures to conceal such relationship" means awareness of facts and circumstances that would lead an average person to believe that the United

States has taken measures to conceal the relationship that has been disclosed. Reason to believe would exist if the person making the disclosure were aware of facts or information that should cause the person to perceive that affirmative concealment measures were taken with respect to the relationship disclosed.

The information covered is any information that identifies, either directly or indirectly, any person having a present or former relationship with the Central Intelligence Agency or a foreign intelligence component of the Department of Defense as an officer, employee, agent, or source of information or operational assistance which the United States takes affirmative measures to conceal from unauthorized persons. The naming of a person as an undercover employee of CIA is a direct disclosure of information covered by the section. Indirect disclosures are covered if they reveal sufficient information to identify an individual as presently or formerly having one of the designated relationships with CIA or a foreign intelligence component of the Department of Defense.

Section 802 proscribes the same disclosures as Section 801 but requires proof that the person making the disclosure has or had authorized access to the information disclosed. Access as used in this section means the opportunity to know, possess, use, or control. Thus authorized access means the opportunity to know, possess, use or control as a result of permission, right, or authority granted pursuant to statute, Executive Order, directive of the head of any department or agency engaged in foreign intelligence activities, order of a United States district court judge, or United States Senate or House of Representative resolution which assigns primary responsibility for the oversight of intelligence activities. Persons with authorized access to information covered by the section are under a special duty to protect the information against disclosure to unauthorized persons. Thus disclosures covered by this section are deemed to warrant imposition of an increased penalty of up to a $50,000 fine or imprisonment for ten years, or both.

Under the terms of Section 803, no indictment or information could be filed for a violation of Sections 801 or 802 unless the Attorney General and the head of the appropriate department or agency engaged in foreign intelligence certified, in writing, to a court having appropriate jurisdiction that at the time of the disclosure the relationship revealed by the information disclosed met the criteria for classification as set out under the appropriate Executive Order applicable at the time of the disclosure, and that the United States had taken affirmative measures to conceal such relationship.

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CHANGES IN EXISTING LAW

The bill would add a new Chapter 38 to Title 18, United States Code.

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COST ANALYSIS

The proposed legislation would not involve any measurable costs.